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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 642

TEXAS PACIFIC COAL & OIL COMPANY,
Petitioner,

vs.

R. G. CALCOTE, ET AL.,
Respondents

RESPONDENT'S ANSWER AND BRIEF IN SUPPORT TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF OF APPEALS, FIFTH CIRCUIT.

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RESPONDENT'S ANSWER AND BRIEF IN SUPPORT TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF OF APPEALS, FIFTH CIRCUIT.

MAY IT PLEASE THE COURT:

Opinions Below

The original opinion, July 31, 1946, copied in Appendix to Petition for Writ, Pages 64-75; dissenting opinion, copied in Appendix to Petition for Writ, pages 76-78; Opinion on Petition for Rehearing, dated September 10, 1946, copied in Appendix to Petition for Writ, pages 79-83.

Statement of Facts

A statement of facts on behalf of the respondents is deemed appropriate and necessary in view of the inac-

curacies, omissions, and matters of argument set forth in the Petition for Writ of Certiorari and Brief in support thereof.

Petitioner is a corporation under the laws of the State of Texas. Under its charter it has authority to acquire mineral leases on property, enter thereon for the purpose of making observations, determining the presence of minerals and the desirability of drilling, the right to drill, lease, and market oil, gas and other minerals. Without complying with the Mississippi statutes, Section 5343, Code of 1942, which is the same as Section 4164, Code of 1930, and with intent to violate Section 5344, Code of 1942, which is the same as Section 4165, Code of 1930, and without complying with Section 5319, Code of 1942, same being Section 4140, Code of 1930, it devised a method of doing business in the State of Mississippi in defiance of the above state statutes. It sent its agents into the State of Mississippi to acquire oil, gas and mineral leases, acquiring the said leases in the name of one of its officers, a Mr. Penn. Some of these leases were acquired during the year 1938. It did not qualify to do business in the State of Mississippi until January 2, 1940. These leases acquired in the name of various agents of petitioner were from time to time transferred to petitioner by assignment from the persons in whose names the leases were taken. A number of leases are shown (T. 68-81) taken prior to the time petitioner qualified to do business and transferred to it before it had qualified to do business in the State of Mississippi.

The lease attacked by the Calcotes was dated June 1, 1939, and was Number 494 of the leases acquired by petitioner in the State of Mississippi in violation of law (T. 71). This lease, along with other leases dated as far back as April 5, 1938, were all transferred at the same time, as appears by assignment dated July 1, 1939 (T. 68-73). It appears from the assignment on the above mentioned pages

that the said J. R. Penn transferred to Texas Pacific Coal and Oil Company a number of leases which had been originally taken in his own name, and a number of leases which had been taken in the names of other agents of the petitioner.

Mr. J. B. Kennedy, an agent of petitioner, entered its employment in May, 1919 (T. 153). He came to Mississippi as the resident agent of petitioner in the first part of 1939 (T. 154). In 1939-1940 he had an Assistant Geologist, and has been since 1939 residing in the State of Mississippi and taking leases for petitioner, taking some in the name of J. R. Penn, President of petitioner, with the intent to transfer same directly to petitioner (T. 155). Kennedy's instructions came from the Vice-President of the petitioner corporation, a Mr. Yager, from whom he took his orders (T. 156). He took up his residence in Mississippi about February 1, 1939, and the office of petitioner was anywhere Mr. Kennedy had his living quarters. He was the only man in Mississippi representing petitioner (T. 178-182).

Kennedy's contract called for him to give his exclusive time to the business of petitioner. He had full and complete discretion as to when, where and what leases to take, and as to the form of lease and all other matters connected therewith (T. 188-189). The manner and method in which he did business for the petitioner in 1939 has remained up to the time of the trial of the cause in the lower court (T. 190). Kennedy was furnished with money to go around and pay for leases and to pay renewal rentals, and he usually settled in cash with each lessor (T. 191-192). He took the leases in the name of J. R. Penn without conferring with that party, but reporting directly to another officer of the company, Mr. Yager (T. 198). The money of the petitioner that was turned over to Kennedy was deposited by him in his own name, he understanding it was the money of petitioner (T. 200). He also did a lot of scoutwork and made reports

to the company (T. 201-202). He agreed to pay for the Calcote lease at the rate of ten cents per acre (T. 230-231).

It appears there were 600 acres owned by the Calcotes in Franklin County, Mississippi, and some 80 to 85 acres in Adams County, Mississippi. Each year after the lease there was paid to Calcote the sum of $60.00 to cover the acreage in Franklin County, Mississippi. Rental checks each year were similar and we copy here the first one that appears in the transcript (T. 106), and it is typical, if not identical, with all of the others:

> "Pay to the Order of R. G. Calcote and wife, Odessa Calcote $60.00 Exactly $60 & 00 Cts. Payment in full for Rent and in lieu of drilling to June 1, 1941 according to terms of oil and gas lease No. Miss-494 made by R. G. Calcote et ux to J. R. Penn of 600 acres *situated in Franklin County, Mississippi,* bearing date June 1, 1939 and Recorded in Book U-3, Page 634." (Emphasis supplied.)

On page 108, Transcript, at the bottom of the page appears a check to cover the period from June 1, 1941, to June 1, 1942, in which check it is definitely stated it is to cover 600 acres *situated in Franklin County, Mississippi,* bearing date June 1, 1939. A similar check appears (T. 111) to cover period from June 1, 1942 to June 1, 1943, for 600 acres *in Franklin County, Mississippi.* A similar check appears at the bottom of page 113 and top of page 114 to cover the rental to June 1, 1944 on 600 acres *in Franklin County, Mississippi.*

The bill of complaint in this cause was filed April 27, 1945. The last rental check appears (T. 116) and is to cover the rental to June 1, 1945. The practice adopted by Mr. Kennedy was to get the lessors to endorse these checks and he would give them the cash.

It was only after the receipt of the last rental payment which was made May 15, 1944, that respondents learned

that the petitioner at the time of obtaining the lease was violating the laws of the State of Mississippi and had not qualified to do business in the State of Mississippi. After ascertaining this fact, respondents refused to accept any further rentals and refused to accept the payment shown by the check dated May 15, 1945, appearing (T. 118), and they brought this suit.

When respondents raised the point that sufficient rentals had not been paid to keep the lease in force and effect, according to the agreement made between respondents and the agent for petitioner, which was to the effect that ten cents per acre per year should be paid, then the petitioners recognized the correctness of the contention by coming into Court and tendering for the year June 1, 1945 to June 1, 1946, $69.82, instead of $60.00 (T. 27).

Also when Calcotes, plaintiffs below, respondents here, ascertained that the lease with petitioner had been made in violation of the laws of Mississippi, they tendered with their bill of complaint into court to the credit of petitioner the amount of all renewal rentals theretofore received by them, together with interest thereon at the rate of six (6%) percent per annum to date of paying the same into the Chancery Court of Adams County, Mississippi, the amount tendered being $354.00 (T. 8).

On April 26, 1945, respondents entered into an oil, gas and mineral lease with one Pete Norsworthy, and this lease appears (T. 10-19). The plaintiffs below, respondents here, sold certain minerals to various parties, and these parties, to-wit, H. Steckol, W. M. Smith, A. Reid Wherritt, and others, were not made parties to the bill of complaint, nor was Norsworthy made a party to the bill of complaint. When petitioner answered and filed its counterclaim, it did not make any of the parties who had bought royalty interests or the said Norsworthy a party to its counterclaim. The royalty deeds appear (T. 120,

125, 130, 136). It is known that some of these royalty owners resided in Mississippi, some in Louisiana, and some in the State of Texas.

This cause was removed from the Chancery Court of Adams County, Mississippi, to the United States District Court for the Southern District of Mississippi, Vicksburg Division, on the ground of diversity of citizenship, and because of the omission of either the plaintiff or the defendant below to include the royalty owners or to include Norsworthy, the holder of a lease on the face of the record, the suit was solely between parties residing in different states and was removed.

The District Court held that petitioner was doing business in Mississippi in violation of the laws of Mississippi, but it also found that the plaintiffs below, respondents here, ratified and confirmed the lease contract dated June 1, 1939, by accepting the benefits thereof without objection thereto and conveying royalty interests in the land described in the lease, subject to the terms of the lease, and by treating the lease contract as being in force and effect up to the time of the filing of the complaint in this cause.

From the decision of the lower court an appeal was duly prosecuted to the Circuit Court of Appeals of the Fifth Circuit, and that Court reversed and remanded the cause because of failure of either party to bring into court other persons who had an interest in the litigation and whose interest would have been vitally affected by any judgment rendered between the Calcotes and the Oil Company. The petition for certiorari seeks to have that decision set aside by this Honorable Court.

It will be noted that the Circuit Court of Appeals definitely found in the majority opinion that the complaint states a cause of action, and that federal jurisdiction depends wholly upon diversity of citizenship, and, therefore, there can be no dispensing with an inquiry as to the absence

of indispensable parties (Opinion of the Court, page 74, Appendix to Petition for Certiorari).

ARGUMENT ON THE LAW

Point I

The Pleadings and the Facts under the Applicable Law Disclose a Real Cause of Action in Respondents

In view of the fact that the petitioner deliberately violated the laws of the State of Mississippi and was, therefore, an intentional and knowing law-breaker, and the fact that respondents, Calcotes, were totally ignorant and unadvised of the fact that they were dealing in reality with a corporation that had not complied with the law, and that as soon as respondents learned its lease had been obtained in violation of the law they refused further rental payments, brought this suit to cancel as a cloud upon their title this illegal lease and tendered to the petitioner the return of all rental payments previously received, together with interest thereon at the rate of six (6%) per cent per annum, under the decisions of the courts of England, of this High Court and of the courts of Mississippi, the said lease having been obtained in violation of the public policy of the sovereign, it cannot be ratified or approved and it cannot be enforced in any court.

We say the rule of law is

> "When a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, nor expressly prohibit it." *Berka* v. *Woodward*, 73 ASR, 31, 125 Cal. 119.

The *Berka* case discusses and mentions the decisions of this Honorable Court hereinafter referred to.

Says this Court in *Bank of United States* v. *Owens*, 2 Pet. 527, 7 U. S. 508:

> "No court of justice can in its nature be made the handmaid of inequity. Courts are instituted to carry into effect the laws of the country. How can they become auxiliary to the consummation of violation of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal."

Again, this Honorable Court, in *Coppell* v. *Hall*, 7 Wall. 542, 19 L. Ed. 244, says:

> "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Where the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its own violation."

The *Owens* case, *supra*, dealt with a provision in the bank's charter, "The bank shall not be at liberty to purchase any public debt whatever, nor shall it take more than at the rate of 6% per annum for or upon its loans or discounts."

In *Tri-State Amusement Co.* v. *Forest Park Highlands Amusement Co.*, 111 ASR, 511, 192 Mo. 404, 90 S. W. 1020, it is said (p. 511 of 111 ASR):

> "Foreign Corporation—Noncompliance with Law—Validity of Contracts. If a statute prohibits foreign corporations from doing business in the state without first having complied with the law, this prohibition is as effective to make the contracts of such corporations void as though the statute in terms so declared them;

for if an act is prohibited or declared unlawful, it is not necessary for the law to declare the act of contract void; an unlawful act is itself void." (p. 524).

"Foreign Corporation—Noncompliance with Law—Validity of Contracts. If a statute provides that foreign corporations, before transacting business in the state, shall perform specified acts, and declares that corporations which do business in the state without complying with such conditions shall be subject to a fine and cannot maintain an action in the courts of the state, a contract entered into by a corporation and partly performed before it had complied with the statute is void, and an action cannot be maintained for a breach of the contract, although prior to the commencement of the suit the law is complied with." (p. 526)

On page 617 of 55 ASR, reporting *Hope* v. *Linden Park, etc.*, 58 N. J. Law, 623, there is a quotation from Lord Mansfield, as follows:

"The objection that a contract is immoral or illegal as between the plaintiff or defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice between him and the plaintiff, by accident, if I may say so. The principle of public policy is this —*ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or a transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground that the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff, so if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for

> where both are equally in fault, *potior est conditio defendentis.*" *Holman* v. *Johnson*, 1 Cowp. 343.

However, in our case, both parties are not equally at fault.

This pronouncement has been approved by the Supreme Court of Mississippi repeatedly.

In the case of *Kountz* v. *Price and Dickson*, decided in the April Term, 1866, reported, 40 Miss. 341, the court concluded its opinion by referring to the statement of Lord Mansfield in *Holman* v. *Johnson*, above quoted. In that case the court went into all phases of contracts illegal in their inception and sets its face firmly against ratification which is tied to the original illegal contract. Therein, the court said:

> " 'The original contract being void,' says the court, in Collins *v.* McCargo, 6 S. & M., 'no valid agreement could be made to rest on the same consideration. They are all void, so long as they can be traced back, and made to depend upon the original illegal consideration.' "

It is clear that acts against public policy cannot be compromised with, annulled or ratified by anyone but the state itself, acting through its legislature.

Right here we take occasion to say that the reference by petitioner to cases of contracts by private parties where no statute was violated cannot be helpful to this Court or any Court in determining the validity of the contract under consideration. Private parties can make any contract they please in any way that a contract can be made, unless it is against public policy.

Petitioner refers to the decision in the case of *Cummings* v. *Mid-States Oil Corp.*, 193 Miss. 675, 9 So. 2d 648. That case can by no stretch of the imagination bear on any feature of this case. The contract in that case was not in violation of any Mississippi law. Petitioner can no more harmonize that case with the violation of the public policy

of the State of Mississippi reflected in the instant case than it can make soda and vinegar dwell complacently in the same body.

In *Rose* v. *Kimberly,* 89 Wisc. 544, 46 ASR, 855, the Court was dealing with a foreign insurance company which did business in Wisconsin without complying with the statute. The court, in that case, refused to enforce a contract made by the offending corporation in the state of its creation. The contract insured property in Wisconsin and the company was seeking to recover an assessment made against the insured. The court recognized the general rule that a contract valid where made is valid everywhere, but stated that the rule is not without exception. The court said that the provisions of the statute of Wisconsin when not complied with would come under the head of an exception to the general rule that a contract valid where made would be valid everywhere. The court said that the contract insuring property in the state necessarily involves the doing of business in the state and hence is subject to the laws of the state.

The *Wisconsin* case, above, was referred to and approved in the *Mississippi* case of *Cowan* v. *London Assurance Corp.,* 73 Miss. 321, 19 So. 298, wherein the Court said:

> "But if the thing done was in violation of the law, it is equally certain that, from the forbidden act, no right of action to be pursued in the courts of this state could arise."

We say that the petitioner has produced no decision in the State of Mississippi holding that a contract made in violation of public policy can be ratified. There is no such decision that we have been able to dig up.

In *Newell Contracting Co.* v. *State Hwy. Com.,* 195 Miss. 395, 15 So. 2d 700, the Supreme Court of Mississippi says:

> "We are of the opinion that the defendant, State Highway Commission, had the right to assume, without

> making any investigation in that behalf, that the complainant, as such a foreign corporation, had complied with the plain mandates of the law in these particulars."

In the above case the Construction company brought suit against the Highway Commission to recover additional compensation for extra work performed under highway construction contract and damages for delay occasioned by the defendant. The construction company was engaged in construction work in Mississippi and in February, 1932, it established a temporary office in Mississippi, and in July, 1932, it made application to the State Tax Commission and obtained a privilege license for the purpose of bidding for construction work. It became a successful bidder and a formal contract was entered into with it on January 12, 1933, a performance bond of $55,000.00 given, the work immediately began and contract completed within approximately one year from that date. That on September 16, 1933, when at least two-thirds of the working days allowed for the completion of the work expired, the construction company complied with the law of the State of Mississippi by filing a copy of its charter with the Secretary of State. Among other defenses made by the Highway Commission was the contention that because of the failure of the construction company to comply with Section 4164, Mississippi Code of 1930 (Section 5343, Code of 1942), the contract was void. The Supreme Court said:

> "We are of the opinion that the court below was correct in holding that the appellant was doing business in this state and that there had been no substantial compliance with the statutes here involved until September 16, 1933, and that hence the contract sued on is void and unenforceable."

The court cited the following cases:

Quartette Music Co. v. *Haygood,* 108 Miss. 755, 67 So. 211;

Peterman Const. & Sup. Co. v. *Blumenfeld,* 156 Miss. 55, 125 So. 548;

Wiley Elec. Co. v. *Electric Storage Battery Co.,* 167 Miss. 842, 147 So. 773;

Marx & Bensdorf, Inc. v. *First Joint Stock Land Bank of New Orleans,* 178 Miss. 345, 173 So. 297;

Case v. *Mills Novelty Co.,* 187 Miss. 673, 193 So. 625, 126 A. L. R. 1102.

"*Peterman Const. & Sup. Co.* v. *Blumenfeld, supra.* In that case it was held that a foreign corporation's compliance with the provisions of the statutes in question, requiring the filing of a copy of the charter or articles of incorporation, can not, insofar as it relates to contracts theretofore executed, be made to relate back to the date of execution thereof, since the contract 'was either enforceable on the date of its execution, or unenforceable.' (156 Miss. 55, 125 So. 551.) These statutes may be harsh in their application, since a failure to comply therewith may in some cases result in the inability of such foreign corporation to collect any part of the consideration for services rendered or goods sold where such defense is interposed, nevertheless, as was said in the Peterman case, 'We cannot vary the law, because our sympathy may be excited by the harshness of its particular application.' "

In the case of *Rideout* v. *Mars,* 99 Miss. 199, 54 So. 801, Mississippi's Supreme Court was dealing with a situation where a life insurance agent made a contract to abate premiums in violation of Section 2600, Code of 1906. The purpose of the statute was to secure equality in the burdens of as well as in the benefits to be derived from life insurance, just as, in the instant case, the purpose of the Mississippi

statute is to have equality as to burdens and benefits between domestic and foreign corporations.

In the *Rideout Case, supra,* the parties were in equal wrong, and yet the court, in order to reflect the public interest and to uphold the public policy, allowed the violation of the statute involved to be used Offensively. It allowed the administrator of the party who had made the illegal contract to sue to have the contract declared void, and the suit was permitted in the interest of the public.

Chapter 97, Laws of Mississipi, 1916, appearing page 87, *et seq.,* Laws of 1916, adopted for the first time in Mississippi what is generally known as the "Blue Sky Law." Under it, persons selling stocks, bonds or securities of corporations under certain conditions were required to first obtain a permit from the Secretary of State.

The Mississippi Supreme Court had occasion to deal with this statute in the case of *Dixie Rubber Co.* v. *Catoe, et al.,* 145 Miss. 342, 110 So. 670. The court held that contracts for sale of stock by a corporation which did not have a permit as required by law were unlawful and void and unenforceable. The court held that where a partial consideration for a bond was illegal, the full consideration is tainted with illegality. The court held that the corporation not obtaining the permit was an outlaw, as it had no right to do business in Mississippi. Also, the court held that every contention that was based on the illegal contract was illegal and void. The court adopted the jurisprudence as expressed by Lord Mansfield and by this High Court in a number of cases, saying:

> "The test whether or not there can be a recovery in this character of case depends on whether the plaintiff, in order to recover, must rely on the illegal contract. If the plaintiff cannot make out his case without proving and relying on the illegal contract, then he must fail. On the other hand, if the illegal contract is a mere in-

> cident in plaintiff's case, if plaintiff can make out his case without relying on and proving such contract, then he is entitled to recover, notwithstanding the illegality of the contract." (110 So. 672.)

In the above quotation lies the distinction which the petitioner would have the Court disregard. To obtain enforcement of its contract, the petitioner must rely on the illegal contract and therefore must fail. The respondents, innocent parties in the transaction, should not be condemned to hold their title clouded by this illegal contract. Public policy demands that respondents should be relieved from its burdens.

In *Cyclone Mining Co.* v. *Baker Light & Power Co.*, 165 Fed. 996, the validity of a contract like we have here is discussed. In page 1001 of 165 Federal Reporter, the Court makes it clear that no estoppel can arise because of dealings between the parties following the illegal contract, and uses this strong language:

> "It would be a revolting doctrine, fraught with inconceivable deleterious results, if a foreign corporation could come into a state not its own, and there carry on a business in direct defiance of the provisions of law by which it may capacitate itself for the transaction of business therein, and then validate its acts because, forsooth, parties had dealt with it."

That case distinguishes between using the illegal contract as a defense and the question of forfeiture. There is no question of forfeiture in the instant case.

In the above case the Court quotes from several decisions of the Supreme Court of the United States pertinent to the issue here and also quotes from *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727, 5 S. Ct. 739, 28 L. Ed. 1137, as follows:

> "It must be conceded that, if the contract on which the suit was brought was made in violation of a law

> of the state, it cannot be enforced in any court sitting in the state charged with the interpretation and enforcement of its law."

Further, page 998 of 165 Fed. Rep., the court said:

> "It would be a vain thing to insist that the federal courts are not bound to the observance of the rule. Are not they in duty bond to enforce state laws, where falling within their cognizance and not contrary to the federal constitution or the laws of Congress, as well as the national laws? If it were otherwise, the states and the Union could not well or long coexist."

This case was decided long before the decision in *Erie* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188.

The suit in this case was brought in the Chancery Court of Adams County, Mississippi, to remove as a cloud upon the title of the Calcotes this illegal contract. Section 404, Code of 1930, carried forward as Section 1324, Code 1942, provides that when a person, not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right of title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may file a bill in the Chancery Court to have such conveyance or other evidence or claim of title cancelled, and such cloud, doubt or suspicion removed from said title. (See Appendix 4 hereto.)

In *Downing* v. *City of Jackson, et al.,* 24 So. (2d) 661, the Supreme Court of Mississippi, *en banc,* January 28, 1946, held that where a servant's injury was proximately caused by the fact that he was violating a statute or municipal ordinance, he cannot recover damages for the injury. In that case a city employe was instructed by his

superior to operate a certain trailer which was not equipped with proper brakes, as required by subsection 3, Section 8249, Code of 1942. The authorized representative of the City of Jackson instructed the driver to operate this trailer and at the time both knew the trailer was not equipped with proper brakes. Following the instructions of his superior, the employe operated the trailer and because of the lack of brakes on the trailer there was an accident and the employe lost his life. The court held there could be no recovery notwithstanding the fact in operating the trailer he followed the instructions of his superior officer.

In the case of *Armstrong* v. *Shell,* decided by the Supreme Court of Mississippi May 27, 1946, reported, 26 So. (2d) 344, the appellee Shell had recovered in the lower court damages against Armstrong for a breach of contract which had been made on Sunday. The record before the Supreme Court showed that the manager for Armstrong had contracted to employ Shell as assistant manager for a year, and that Shell had come to work and had worked a number of months, some ten months or so, when he was discharged, and brought suit under the contract. It developed that the contract had been entered into on Sunday and notwithstanding the fact that the record contained testimony to the effect the contract had been ratified and Shell had been allowed to work under the contract for a number of months, the court held the contract invalid. It is also set up in the case that Armstrong was in equal wrong with the employe Shell, the court held that Armstrong was not *in pari delicto* because he was not attempting to enforce the contract, and that as Shell grounded his right on contract, he could not prevail.

The Court, in that case, said the contract was made in violation of Section 2368, Code of 1942, which is the same

as Section 1131, Mississippi Code 1930. That section simply provides:

> "If any person, on the first day of the week, commonly called Sunday, shall himself labor at his own, or any other trade, calling, or business, or shall employ his apprentice or servant in labor or other business, except it be in the ordinary household offices of daily necessity, or other work of necessity or charity, he shall, on conviction, be fined not more than twenty dollars for every offense, deeming every apprentice or servant so employed as constituting a distinct offense * * *."

Then follow certain exceptions of public service corporations, but not pertinent to this discussion.

The statute does not say the contract made on Sunday shall be void. It simply says that any work done on Sunday of the character mentioned shall subject the offender to a penalty of $20.00 for each offense.

In passing upon the *Armstrong* case the court called attention and referred to a number of Mississippi cases on the subject, and among the cases referred to was the case of *Thompson* v. *Weems,* 5 Cir., 111 Fed. (2d) 566. This case was decided May 3, 1940. The facts were that the insured under a policy some four hours before his death requested a change of beneficiary in his insurance policy. The entire transaction, said the Court, was made and completed on Sunday and the Court held the change in beneficiary void. Justice Holmes, the organ of the Court, said:

> "The Sunday laws in Mississippi are strict but we have no right to carve exceptions upon them."

In *Smith et al.* v. *Mills,* decided February 25, 1946 by the Supreme Court of Mississippi, reported 24 So. 2d 864, the court held that the action of corporate directors at a

meeting on Sunday was void. The court said the Mississippi statute prohibits anyone under penalty of conviction from "laboring at his own or any other trade or calling or business." Exceptions to the statute omitted.) The court said under that section agreements and contracts entered into on Sunday are void, saying:

> "We find it unnecessary to support our conclusions by invoking the principle denying resort to estoppel to sustain a contract void as being against the law or public policy."

The court clearly held that resort could not be had to estoppel to sustain a contract void as against the law or public policy.

In the case now before the Court our statutes prohibiting this contract go far beyond anything to be found in the Sunday statute. A corporation is subject to a fine under one section, it is prohibited from recovering under another section, and under another section it is prohibited from bringing or maintaining any action or suit in any of the courts of the state. There is no distinction recognized, such as petitioner contended for in the lower court and the appellate tribunal, between what is *malum in se* and what is *malum prohibitum*. When a contract is made in violation of public law or public policy that distinction disappears.

The contentions of petitioner throughout this case exhibit a total misapprehension of the character, foundation and policy of the rule *ex turpi causa non oritur actio*, which was the principle applied by this court in the case of *Coppell* v. *Hall*, 7 Wall. 542, 19 L. Ed. 244.

The petitioner has placed itself by its deliberate conduct in a position quite similar to that occupied by the plaintiff and appellant in the case of *Bank of Newberry* v. *Stegall, et al.*, 41 Miss. 142, decision rendered at the October Term,

1866, of the Supreme Court of Mississippi. The briefs in that case are profuse and lengthy and are discussed by the court in its opinion. In its concluding remarks, 41 Miss. 187, the court said:

> "The money and property sought to be recovered were placed in the hands of the agent for an unlawful purpose, and were used by him in pursuance of his employment, in an unlawful pursuit; and to say that the bank can now recover, at law, the fruits and profits of the illicit venture, or the balance remaining in the hands of the agent at its close, would be to cover the whole proceeding with a legal sanction. This we cannot do."

In the case now before the court, petitioner sent its agents into the State of Mississippi to do something illegal. It furnished its agent with funds which the agent put in the bank to its own credit and use in buying mineral leases. To say now that the petitioner can use and keep the fruits of its unlawful action, would be, in the language used in the decision of the Supreme Court in the case above quoted, to make the court the handmaiden of inequity.

In the case of *Bohn* v. *Lowery*, 77 Miss. 427, 27 So. 604, the Supreme Court held a contract made against public policy is void and cannot constitute a consideration to support a contract.

And yet, in the face of all of these decisions, we find petitioner contending time and time again that respondents confirmed and validated the illegal contract by the pacific acceptance of renewal rentals and by selling royalty rights to other parties.

Petitioner continues to ignore the principle that to this illegal contract there were three parties to be considered: (1), the state, as the protector of its public policy; (2), the lessor; (3), the lessee, who came into the state in defiance of the law and public policy of the state and made this con-

tract. It is well settled that such a contract cannot be ratified, approved or validated short of an act of the legislature of the state.

Section 217, 12 *Am. Juris.*, "Contracts", in discussing the right to relief of party "not in *pari delicto*," says that a distinction has been made between those illegal agreements, both parties to which are equally culpable, and those in which, although both have participated in the illegal act, the guilt rests chiefly upon one. The text holds that cases where the courts will give relief to one of the parties on the ground that he is not in *pari delicto* form an independent class, entirely distinct from those cases which rest upon a disaffirmance of the agreement before it is executed. But, as in the case of the repudiation of an executory illegal agreement, the recovery is had not under, but independently of, the agreement which is treated as a nullity.

This agreement is yet executory because there has been no drilling upon the property of Calcote. Because there have been no operations under the contract on the property of Calcote, because the royalty owners are held up in the air and their term royalties are running out and their mineral rights are being jeopardized from day to day, there is created a condition wherein they are indispensable parties as held by the Circuit Court of Appeals.

In 12 *Am. Juris.*, Sec. 209, page 713, we find on page 715:

> "An agreement contrary to public policy will not be enforced, though in the particular instance no actual injury may have resulted to the public and the parties thereto were not conscious that they were doing a thing which the law did not approve. It has been said that illegal agreements are void, and the courts will not recognize rights as springing therefrom."

In the case of *Quartette Music Co.* v. *Haygood*, 108 Miss. 755, 67 So. 211, the Mississippi court quoted and adopted

Lord Holt's dictum, which was also approved in the case of *Bohn* v. *Lowery*, 77 Miss. 427, 27 So. 605, to-wit:

> "Every contract made for, or about, any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the defaulter, because a penalty implies a prohibition though there are no prohibitory words in the statute."

Petitioner cites the case of *Citizens' Bank* v. *Grigsby*, 170 Miss. 655, 155 So. 684, decided June 11, 1934. It has been aptly said of that case by a distinguished Mississippi lawyer that it had no ancestry and left no descendants. Certainly, it has not been cited nor approved by the Mississippi court, and, in *Case* v. *Mills Novelty Co.*, decided by the Mississippi Supreme Court February 12, 1940, some six years after the decision in the *Grigsby* case, reported 187 Miss. 673, 193 So. 625, it is said:

> "If the sale of this ice cream dispenser was an intrastate transaction then the contract by which the sale was made is void."

There is no qualification here as to the sale being other than void.

In *Deans* v. *McLendon*, 30 Miss. 344, suit was brought on two promissory notes given for the purchase price of slaves. Defendant pleaded that the slaves were introduced into this state as merchandise and sold to plaintiff by defendant without plaintiff having first secured the certificate required by the statute for introduction of slaves and having it recorded as required by statute, and, further, that the slaves were brought into the state and sold contrary to public policy. The court said:

> "It is not now to be controverted, that no action can be maintained upon a contract, the consideration

of which is either immoral in itself or prohibited by law; or which is made in contravention of public policy.

"Courts of justice in the observance of these rules, are not influenced by any consideration of respect or tenderness for the party who insists upon the illegality of a contract, but exclusively by reason of public policy. The object is to punish the active agent in the violation of a law by withholding from him the anticipated fruits of his illegal act; and thus, by deterring all persons from violating its mandates, to give sanctity to the law and security to the public. • • •

"The illegality, and consequent invalidity of any contract made in direct violation of the provisions of this statute, is a question which admits of no debate."

To the same effect is the decision of the Supreme Court of Mississippi in *Green* v. *Robinson*, 5 How. (Miss.) 80.

We earnestly submit, with deference, that the Calcotes stated a definite and complete cause of action in the original complaint under the facts and under the applicable law. So doing, the opinion of the Circuit Court of Appeals necessarily searches the record and finds a lack of indispensable parties. The presence of these indispensable parties admittedly would affect the right of removal from the state court to the district court and as to original federal jurisdiction. The appearance of these parties could and probably would defeat federal jurisdiction.

Point II

The Decision of the United States Circuit Court of Appeals for the Fifth Circuit, Sought to Be Set Aside in This Proceeding, Is Correct.

The decision complained of in the Petition for the Writ, rendered July 31, 1946, appears in Appendix to Petitioner's Brief, pages 64, *et seq.* That decision speaks for itself and holds that the complaint stated a cause of action, but be-

cause federal jurisdiction depended wholly upon diversity of citizenship, the failure to joint parties vitally interested in the outcome of the litigation required the case to be reversed.

We do not see where we can add anything to the reasoning of the majority opinion in the Circuit Court of Appeals, both on the original hearing and on Petition for Rehearing.

To specifically answer the several points raised in the Petition and Brief for Writ of Certiorari, we submit the following:

1. It is contended that the Honorable Fifth Circuit Court of Appeals, in reversing the judgment of the District Court and remanding the cause because of the lack of indispensable parties, held contrary to the decision of this Court in *Bourdieu* v. *Pacific Western Oil Co.*, 299 U. S. 65, 81 L. Ed. 42, and to the decision of the Ninth Circuit in *Verde River Irrig. & Power Dist.* v. *Salt River Valley Water Users' Assn.*, 94 Fed. 2d 936.

In the *Bourdieu* case, *supra,* the Court held:

> "The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, *absent and beyond the jurisdiction of the court,* it will be done; and a court of equity will strain hard to reach that result. (Citing cases and authorities.)
>
> "We refer to the rule established by these authorities because it illustrates the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties *that cannot be brought in.*"

The decision, therefore, was upon the principle that the United States in that case was beyond the jurisdiction of the Court and the complaint failed to state any cause of action against anyone. Hence, it was unnecessary to determine proper or indispensable parties.

The same is true of the *Verde River* case, *supra,* in which the *Bourdieu* case, *supra,* is quoted at length on this particular point.

2. It is next contended that the reversal by the Fifth Circuit with remand and directions to make the royalty purchasers parties was contrary to the *Bourdieu* case and the *Verde River* case, *supra,* because the petition of the plaintiffs in the trial court stated no cause of action.

We refer the Court, however, to our argument under *Point I* herein, from which it readily appears that a substantial cause of action was stated as to the relief sought on the part of the Calcotes.

In the opinion on the Petition for Rehearing, in Footnote 3 (page 81, Petition and Brief), the Circuit Court of Appeals refers to the case of *Barney* v. *Baltimore City,* 6 Wall. 280, 284, 285, 18 L. Ed. 825; *Donovan* v. *Campion,* 85 Fed. 71, 72; also, *Dobie on Federal Procedure,* p. 218.

Another case directly in point is *Lee* v. *Lehigh Valley Coal Co.,* 267 U. S. 542, 69 L. Ed. 782. In that case, Lee, the owner of an interest in a coal mine in his own right, brought an action against the Lehigh Valley Coal Company, the lessee, to cancel the lease on grounds of fraud. A Mrs. Dixon owned also an interest in the lands that were leased for coal mining purposes. Mr. Justice Holmes pointed out that although Lee filed suit against both Mrs. Dixon and Lehigh Valley Coal Company on the allegation that Mrs. Dixon would not join as a party plaintiff and was, therefore, made a defendant, on the argument both parties argued that Mrs. Dixon was not a necessary party. The court stated:

> "When a defendant seeks to remove a suit from a state court to the district court, of course he is entitled to contend that a party joined by the plaintiff is not a necessary party, and therefore does not make the re-

moval impossible by defeating the jurisdiction. Salem Trust Co. *v.* Manufacturers' Finance Co., 264 U. S. 182, 68 L. Ed. 628, 31 A. L. R. 867, 44 Sup. Ct. Rep. 266. It is a different question whether the plaintiff can repudiate the effect of his own joinder, can retain a party to the relief sought, and yet keep him on the wrong side in order to avoid the effect of his own act. Without inquiring whether the plaintiff could have maintained the suit alone had he so elected, and had he found it impossible to join Kate P. Dixon, obviously she was a 'necessary' even if not an indispensable party, Shields *v.* Barrow, 17 How. 130, 139, 15 L. Ed. 158, 160. It would be hard upon the Coal Company to compel it to submit to an adjudication upon the lease, upon a fraud alleged to have been committed against both owners, and to an account, in the absence of one of the lessors. The joinder of both is much more than a mere form. As both are named, they must be arranged upon the side on which they belong.''

Here, the royalty owners, as shown by the royalty transfers in this record, are directly and positively interested and their joinder, as required by the Fifth Circuit Court of Appeals, is not just a mere form, but they are necessary and indispensable parties to a complete adjudication of the rights of the several owners of the land or of the oil and minerals, and the court cannot enter any decree that will not directly affect the interests of these royalty owners.

The argument presented on the first point is likewise applicable.

3. It is next contended that the decision of the Fifth Circuit Court of Appeals reversing and remanding the case with directions that the royalty owners be made parties, is directly contrary to a rule of federal procedure and practice announced in *Pugh* v. *McCormick,* 14 Wall. 361, 20 L. Ed. 791.

That was an appeal by Writ of Error from the Supreme Court of the State of Louisiana for the review of a decision by that court. The Supreme Court held that where a case was brought by Writ of Error to a state court for reexamination, the Supreme Court of the United States is not inclined to reverse the judgment unless there is some substantial error to the prejudice of the complaining party. We submit that the rule there announced is applicable on this Petition for Certiorari because the bringing in of these additional parties that the Circuit Court of Appeals has held are indispensable parties cannot materially affect any rights that the petitioner here may have when the case is tried on its merits, other than the possible defeating of federal jurisdiction, which is not a right but a privilege granted to litigants.

4. It is next contended that the Fifth Circuit Court of Appeals, in reversing and remanding the case and requiring these absent royalty and mineral right owners to be made parties, held contrary to and disregarded other decisions on important federal practice and procedure in its own decisions.

In *Spring* v. *Ohio Oil Co.*, 108 Fed. 2d 560, the Oil Company brought suit against Spring to remove a cloud on its title on certain lands in Pecos County, Texas, and to quiet possession of said lands and for injunctive relief. Federal jurisdiction was based upon diversity of citizenship and sufficient jurisdictional amount. Spring admitted the lease of the oil company and its application to drill under the laws, but denied that the land in question was located in Section 33 as contended by the oil company. In addition, Spring filed motions to dismiss on the grounds that the State of Texas and certain individuals and corporations were indispensable and necessary parties. The District Court heard evidence on these motions and made compre-

hensive findings of fact, and upon such findings overruled the plea to the jurisdiction and granted an interlocutory injunction against Spring. The case was appealed, not on the merits but on the sole question as to whether or not the District Judge abused his discretion in granting the interlocutory injunction. The court thereupon determined whether the District Court had jurisdiction. The court there pointed out that upon the findings made by the District Court neither the State of Texas nor the other parties named were necessary or indispensable parties. As to the state, they held that the state could have no possible interest in the land or the minerals since it had conveyed all of its interest away. As to the individual parties, the court did not point out upon what Spring claimed their interests in the land to rest, and under the findings of the District Court, the Circuit Court of Appeals held that they were not necessary or indispensable parties.

We submit that this authority is not contrary to the holding of the Fifth Circuit in the instant case.

Seeley v. *Cornell,* 74 Fed. 2d 353, 90 Fed. 2d 562. This was a suit by Seeley and others against Cornell and others. The bill was dismissed by the District Court and, upon appeal, the cause was reversed and remanded. The bill was dismissed on the sole ground that indispensable parties had been omitted and that their joinder and proper alignment would defeat jurisdiction. The rule was stated by the court, as follows:

> "Where the interests of the parties before the court are separable from those of the parties omitted, and the court can do justice between the parties before it, without prejudice to the rights of the absentees, jurisdiction will be maintained."

In the opinion of the Fifth Circuit in the instant case (Appendix to Petition for Writ, etc., pages 71-72), the court

points out that the Calcotes had sold to the royalty owners an interest which, as the court held, vested in the royalty owners a vested interest in *praesenti*, and in *futuro*, and that any cancellation of the Calcote lease (to say nothing of the action on the Norsworthy lease) would destroy the vested interests of the royalty owners in *praesenti* and would tend to destroy the vested interest in *futuro* and postpone the enjoyment of that interest indefinitely; that vested interests of absent parties further were directly and vitually affected, regardless of the outcome of the litigation.

We see no conflict in that holding and that of *Seeley* v. *Cornell, supra.*

Seeley v. *Hunt,* 109 Fed. 2d 595, throws absolutely no light on the proposition here. It is a companion case to *Seeley* v. *Cornell, supra,* and involves only the matter of the allowance of attorney's fees.

Oxley v. *Sweetland,* 94 Fed. 2d 33, is a decision by the Fourth Circuit. The decision by Circuit Judge Parker points out that it was an action to determine the rights of the parties then before the court in certain personal property under the laws of descent and distribution established by the statutes of the State of West Virginia. The decision was based upon *Revised Statutes,* Sec. 737, *Jud. Code,* Sec. 50, 28 U. S. C. A., Sec. 111, which provides:

> "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the dis-

> trict, as aforesaid, shall not constitute matter of abatement or objection to the suit."

The facts here disclosed that some of the royalty owners are residents and citizens of Mississippi and are actually residing in the Vicksburg Division of the Southern District of Mississippi and are, therefore, inhabitants of and are found or may be found within this district.

The statute, therefore, is not applicable and the decision is not here controlling.

5. It is next contended that the Fifth Circuit, in reversing and remanding the case with directions, where neither of the parties had raised the issue as to their absence, held contrary to the decision of the Sixth Circuit in the case of *Home Insurance Co.* v. *Scott,* 46 Fed. 2d 10, and of this Honorable Court on appeal in the same case, *Sun Insurance Office* v. *Scott,* 284 U. S. 177, 76 L. Ed. 229.

The case in the Circuit Court of Appeals for the Sixth Circuit gives no comfort to petitioner here. The court pointed out:

> "Nor in our opinion was it error to permit plaintiff to proceed with the trial without making the mortgagee bank a party plaintiff. The insurance companies agreed in case of loss to pay the money to the insured and the bank (the mortgagee). They could have made the bank a party to the proceedings if they had wanted to. They preferred, apparently, not to do so but to litigate the claim with the party to whom the primary liability was due. After doing this they cannot be permitted to say that the judgment should be reversed because the bank was not a party."

The court then pointed out that on remand the bank could be brought in as a party and the rights of all could be protected by the final adjudication in the District Court. Here, Mr. Calcote on the record owns one-fourth of one-

eighth (¼ of ⅛) royalty interest, and the other royalty owners own three-fourths of one-eighth (¾ of ⅛) royalty interest. They are all primary parties and there is no question of primary and secondary parties. (See Appendix 7 hereto, records of Franklin County, Mississippi, showing royalty owners.)

The decision of the Supreme Court in reversing the Sixth Circuit Court of Appeals, did not touch upon the necessity or lack of necessity of the mortgagee as a party.

6. It is finally contended that the Fifth Circuit Court disregarded and refused to give effect to Mississippi statutes and decisions (Page 10, Petition for Certiorari).

In Appendix 1 through 6, inclusive, we give herewith applicable Mississippi statutes on removing clouds and confirming titles.

Petitioner relies on *Wilson* v. *Foster Creek Lbr. & Mfg. Co.*, 134 Miss. 880, 99 So. 437. That was an action by a lumber company against Wilson and others, brought in the Chancery Court, under Section 549, Code of 1906, which is the same as Section 1323, Code of 1942 (See Appendix 5 to this brief). The particular appellants were served with process, appeared and demurred to the appellee's bill. Thereupon, lumber company dismissed without prejudice as to appellants and an order was so entered. The cause proceeded to a hearing as to other defendants and a final decree was entered confirming the lumber company's title, except as to the named appellants. The court was careful to point out that at the time of dismissal of the bill as to the particular appellants the cause had only proceeded to demurrer, but the court said the right to dismiss as to these particular defendants was ruled by *Smith* v. *Jassen*, 105 Miss. 227, 62 So. 172. In that case, the court was careful to point out that the proceeding was under Section 549, Mississippi Code of 1906, rather than Section 550, Code of 1906.

Section 549 is the same as Section 1323, Code of 1942, and Section 550 is the same as Section 1324, Code of 1942. (See Appendix 5 and 6 hereto.) The original complaint here was brought under Section 1324, Mississippi Code 1942, which is the same as Section 550 of the Code of 1906.

In addition, the original bill was filed in the state equity court to remove clouds and to quiet and confirm the title of the complainant, Calcote. The exact interest of Calcote and of that of the royalty owners was not made apparent until in the course of the trial on the presentation of the defense and the asserted counterclaim of petitioner.

It is our understanding that equity delights in administering complete relief and that it requires all persons interested to be made parties. In Mississippi the rule goes even to the extent that if the ground of equity fail under the proof, the cause may still be retained to a complete final decree on all of the issues and as to all of the interested parties. See *Griffith's Mississippi Chancery Practice,* page 31, Sec. 28, citations, note 20.

We also suggest the maxim that equity delights to do complete justice and not by halves.

Finally, the contention is directly contrary to the decision of *White, et al.* v. *Union Producing Company,* 5 Cir., 140 Fed. 2d 176, decided January 19, 1944; petition for rehearing denied February 25, 1944. See, also, same case, 153 Fed. 2d 856, 156 Fed. 2d (Adv. Sheet #1) 58. Compare *Trimble* v. *John C. Winston Co.,* 56 Fed. 2d 150, Certiorari denied, 286 U. S. 555, 52 S. Ct. 580, 76 L. ed. 1289; also, *Williams* v. *Bankhead,* 19 Wall. 563, 570, 86 U. S. 563, 22 L. ed. 184.

It is also argued that *McLendon* v. *McGee,* 189 Miss. 712, 198 So. 725, holds that only an adverse claimant is a necessary party. At page 727 of 198 Southern, the court points

out, on the question of indispensable parties to a suit to cancel cloud on title, that it is necessary to join as defendants those who are asserting an adverse claim "or hold such record evidence of title as should be cancelled in order to remove any cloud, doubt or suspicion as to the ownership of the true title." The court on the facts of that case held that the Dry Goods company was not an indispensable party since it did not affirmatively appear on the record that they held any record title or were asserting any adverse claim.

In the instant case the record title to three-fourths of the interest involved is in parties who are not before the court and their claims are matters of record (See Appendix 7 hereto).

Conclusion

We submit, with deference, that the petitioner's asserted title under its lease is, in any event, absolutely void, that the decision of the Circuit Court of Appeals evidently so recognized that fact under the record and under the law and thereby held that the royalty owners were necessary and indispensable parties to a complete adjudication of the various equities between those asserting title to the property in question.

We submit further that the Circuit Court of Appeals, after an examination of the record, having come to the conclusion that these parties not joined (Norsworthy, holding a lease, and the others, holding three-fourths of the royalty interests) should be before the court, such conclusion should not be disturbed.

Finally, there is no conflict between the decision of the Circuit Court of Appeals in the instant case and any of the applicable authorities referred to in the Petition and Brief for Certiorari.

Wherefore, respondents pray that the Writ of Certiorari be denied.

Respectfully submitted,

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I, Forrest B. Jackson, of counsel for Respondents, hereby certify that I have this day delivered in person to Honorable W. H. Watkins, one of counsel for petitioner, a true and correct copy of the foregoing response to Petition and Brief for Writ of Certiorari.

This October 18th, 1946.

FORREST B. JACKSON,
Of Counsel for Respondents.

I, the undersigned, of counsel for Petitioner in the above entitled and numbered cause in the Supreme Court of the United States, hereby certify that I have this day received a true and correct copy of the foregoing Response to Petition and supporting Brief for Writ of Certiorari from counsel for respondents.

This the 18th day of October, 1946.

W. H. WATKINS,
Of Counsel for Petitioner.

APPENDIX 1

Section 5343, Code of 1942, which is the same as Section 4164, Code of 1930.

Charters to be Filed. Every company or corporation for profit incorporated under or by virtue of the laws of any government, or of any other state or territory, now or hereafter doing business in this state, shall file in the office of the secretary a copy of its charter or articles of incorporation, or in case such company or corporation is incorporated merely by certificate, then a copy of such certificate duly certified and authenticated. Said charters, articles of incorporation or certificates to be filed shall be duly certified by the president and secretary, or other chief executive of such corporation, and by attaching thereto the corporate seal, and the secretary of state, on the payment of the fees herein provided for shall give certificate that said corporation has filed its charter or articles of incorporation as required by this act, and any foreign corporation which shall not file a copy of its charter or certificate or articles of incorporation, as provided in this act, shall be liable to a fine of not less than $100.00. This section shall not apply to insurance companies, and is not to be taken or construed to change or modify the laws which are directly applicable to the character of corporations.

APPENDIX 2

Section 5344, Code of 1942, which is the same as Section 4165, Code of 1930.

Foreign Corporations, Powers. Corporations which exist by the laws of any other state of the Union, by the Acts of Congress, or the laws of any foreign country, may sue in this state by their corporate names, and they shall also be liable to be sued or proceeded against, by attachment or otherwise, as individual non-resident debtors may be

sued or proceeded against. And the acts of the agents of any such foreign corporation shall have the same force and validity as the acts of agents of private persons; but such foreign corporations shall not do or commit any act in this state contrary to the laws or policy thereof, and shall not be allowed *to recover* on any contract made in violation of law or public policy.

APPENDIX 3

Section 5319, Code of 1942, which is the same as Section 4140, Code of 1930.

Resident Agent: How Designated. Every domestic corporation shall maintain an office in the county of its domicile in this state, either in charge of an officer or officers of the corporation, or in charge of some persons or corporation duly designated as resident agent for the service of process by the directors (by whatever name called) of such corporation, a duly certified copy of the resolution designating such resident agent, and the written acceptance of such agency by the agent, to be filed with the secretary of state. In the event of the death, resignation or removal of such resident agent, another shall be substituted within thirty days in the same manner and accompanied by the same fee as in the former appointment; and until such substitution, or in event of the failure of a corporation to so designate and qualify a resident agent where one is required by this act, the secretary of state shall be the agent for the service of process upon such corporation without resident agent, until one shall have been designated as herein provided.

Every foreign corporation doing business in the state of Mississippi, whether it has been domesticated or simply authorized to do business within the state of Mississippi, shall file a written power of attorney designating the secretary of state or in lieu thereof an agent as above provided in this section, upon whom service of process may be had in the event of any suit against said corporation;

and any foreign corporation doing business in the state of Mississippi shall file such written power of attorney before it shall be domesticated or authorized to do business in this state, and the secretary of state shall be allowed such fees therefor as is (sic) herein provided for designating resident agents. Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state.

APPENDIX 4

Section 404, Code of 1930, same as Section 1324, Code of 1942.

Removing Clouds Upon Titles. When a person, not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may file a bill in the chancery court to have such conveyance or other evidence or claim of title cancelled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not; and any person having the equitable title to land may, in like cases, file a bill to divest the legal title out of the person in whom the same may be vested, and to vest the same in the equitable owner.

APPENDIX 5

Section 403, Code of 1930, same as Section 1323, Code of 1942.

Any Other Title May be Confirmed. The owner in possession of any land, or the owner thereof who may be out of possession, if there be no adverse occupancy thereof,

may file a bill in the chancery court to have his title confirmed and quieted; and the law for notice, process, proceedings, and practice, as provided for confirming and quieting tax-titles shall apply, no matter by what tenure the complainant may hold; and unknown and non-resident parties may be made defendants as they are made defendants to proceedings to confirm tax-titles. If on the final hearing of any such suit the court shall be satisfied that the complainant is the real owner of the land, it shall so adjudge, and its decree shall be conclusive evidence of title as determined from the date of the decree as against all parties defendant.

APPENDIX 6

Section 402, Code of 1930, same as Section 1314, Code of 1942.

Proceedings to Confirm Tax Title. Any person holding or claiming under a tax title lands heretofore or hereafter sold for taxes, when the period of redemption has expired may proceed by sworn bill in the chancery court to have such title confirmed and quieted, and shall set forth in his bill his claim under the tax sale, and the names and places of residence of all persons interested in the land, so far as known to complainant, or as he can ascertain by diligent inquiry; and where the names of persons in interest or their places of residence are unknown and have not been ascertained by diligent inquiry the bill shall so state; and where the name and places of residence of persons in interest are given they shall be made parties defendant; and where the bill shall show that the persons interested are unknown to complainant and that he has made diligent inquiry for their names and could not obtain them, all persons interested may be made defendants by a notice addressed: "To all persons having or claiming any interest in the following described land, sold for taxes on (inserting date of sale), viz: (Describing land as described in the tax collector's conveyance);" and the notice shall state the

nature of the suit and it shall be published in the same manner and for the same time and require the appearance of the defendant at the same time as in other cases of summons by publication for non-resident or unknown defendants in chancery. And it shall be lawful in all cases to set forth in the bill the names of all persons interested, as far as ascertained, and make them parties and also to join and make defendants "all persons having or claiming any legal or equitable interest in" the lands described in the bill. Such suits shall be proceeded with as other cases; and if the bills be taken for confessed, or if it appear that complainant is entitled to a decree, it shall be rendered, confirming the tax title against all persons claiming to hold the land by title existing at the time of the sale for taxes; and such decree shall vest in the complainant, without any conveyance by a master or commissioner, a good and sufficient title to said land; and such decree shall, in all the courts of this state, be held as conclusive evidence that the title to said land was vested in the complainant, as against all persons claiming the same under the title existing prior to the sale for taxes.

APPENDIX 7

Royalty transfers affecting Calcote property, as shown by the Deed Records of Franklin County, Mississippi

Book	*Page*	
W-3	447	R. G. Calcote and Odessa Calcote to W. M. Smith—an undivided 1/2 royalty interest—deed dated 7/6/43.
W-3	641	W. M. Smith to John D. Gholson—an undivided 1/16 royalty interest—deed dated 10/29/43.
W-3	643	John D. Gholson to S. J. Hooper—an undivided 1/16 royalty interest—deed dated 10/29/43.
W-3	439	W. M. Smith to Sam Dorfman—an undivided 20/680 royalty interest—deed dated 7/19/43.
W-3	637	W. M. Smith to C. L. Morgan—an undivided 1/16 royalty interest—deed dated 10/9/43.
X-3	421	R. G. Calcote and Odessa Calcote to A. Reid Wherrit—an undivided 1/8 royalty interest—deed dated 3/6/44.
X-3	427	R. G. Calcote and Odessa Calcote to H. Steckol—an undivided 1/16 royalty interest—deed dated 3/6/44.

Book	*Page*	
X–3	423	R. G. Calcote and Odessa Calcote to A. Reid Wherrit—an undivided 1/16 royalty interest—deed dated 3/6/44.
X–3	455	A. Reid Wherrit to The North Central Texas Oil Company, Inc.—an undivided 1/16 royalty interest—deed dated 3/6/44.
X–3	457	A. Reid Wherrit to The North Central Texas Oil Company, Inc.—an undivided 1/32 royalty interest—deed dated 3/6/44.
X–3	479	H. Steckol to George D. Hunt—an undivided 1/32 royalty interest—deed dated 3/27/44.
X–3	525	W. M. Smith to John D. Gholson—an undivided 68.75/680 royalty interest—deed dated 7/7/43.
X–3	527	W. M. Smith to G. A. Clement—an undivided 47.5/680 royalty interest—deed dated 7/7/43.
Z–3	15	W. M. Smith to George E. Shaw—an undivided 20/680 royalty interest—deed dated 7/19/43.
Z–3	141	North Central Texas Oil Company to Emil Mosbacker, New York—an undivided 9/320 royalty interest—deed dated 3/6/44.
Z–3	327	W. M. Smith to G. A. Clements—an undivided 47.5/680 deed dated 11/29/44.—interest corrects deed in X–3, 527.
Z–3	329	W. M. Smith to John D. Gholson—an undivided 68.75/680 royalty interest—deed dated 11/29/44.—interest corrects deed in X–3, 525.
Z–3	409	John D. Gholson to G. A. Clements—an undivided 10.625/680 royalty interest—deed dated 2/22/45.
Z–3	449	John D. Gholson and G. A. Clements to Edwin B. Cox and Jake L. Hamon, First National Bank, Dallas, Texas—an undivided 116.25/680 royalty interest—deed dated 3/16/45.
Z–3	539	S. J. Hooper to C. D. Hunt and E. R. Whitaker—an undivided 1/32 royalty interest—deed dated 6/21/45.
A–4	301	W. M. Smith to Southland Royalty Company, Inc.—an undivided 630/5440 royalty interest—deed dated 2/16/46.